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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1936

No. [redacted] 185

JOSEPH E. MARDON,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

BRIEF FOR PETITIONER.

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Subject Index

Part I

Page

I. History of the case 1

II. The facts in the instant case 3

III. Specification of objections to the search and seizure of Marron's private property 8

Part II

The law 11

I. The law of Marron v. United States, 8 Fed. Rep. Second Series, page 251, and an analysis of the authorities relied upon in the decision to support the conclusions found therein 11

II. Analysis of the authorities in Sayers v. United States, 2 Fed. Second, 146 16

III. The seizure of the papers, records, books of account and the ledger was made in contravention of the rights of Marron under the Fourth and Fifth Amendments to the Constitution of the United States of America, for the reason that said papers, records, books of account and ledger were not particularly described in the search-warrant as those to be seized as required by the said amendments 35

IV. Kirvin v. United States, 5 Fed. 2d 282, should be followed as an authority on the facts in the instant case rather than the first decision in Marron v. United States, 8 Fed. 2d 251 46

V. This honorable court has had occasion to disapprove of a portion of the Marron opinion by its recent decision in the case of U. S. v. Katz, 70 Ed. 554, ... 50

VI. The facts in the Kirschenblatt case 52

VII. Veeder v. United States, 252 Fed. Rep. page 414, decided by the United States Circuit Court of Appeals for the Seventh Circuit supports the conclusions arrived at by the United States Circuit Court of Appeals for the Second Circuit in Kirvin v. United States 59

VIII. Conclusion 61

Table of Authorities Cited

Pages

Adams v. New York, 192 U. S. 585, 24 S. Ct. 372, 48 L. Ed. 575 16
Agnello v. U. S., 269 U. S. 20, 46 S. Ct. 4, 70 L. Ed. 145.. 57
Amos v. U. S., 255 U. S. 313, 41 Sup. Ct. 266, 65 L. Ed. 654 45

Barber, Petition of, 281 Fed. 550..... 43
Baron v. U. S., 286 F. 822, 824 (C. C. A. 6)..... 54
Boyd v. U. S., 116 U. S. 616 (6 Sup. Ct. 524, 29 L. Ed. 746) 23, 56
Brady v. U. S., 300 F. 540 (C. C. A. 6)..... 55

Carroll v. U. S., 267 U. S. 132, 45 S. Ct. 280, 69 L. Ed. 543, 39 A. L. R. 790..... 57

Dillon v. O'Brien, 16 Cox, Cr. Cas. 245.....54, 58

Entick v. Carrington, 19 Howell, St. Tr. 1029.....26, 56

Fitter et al. v. United States, 258 Fed. 567..... 41

Getchell v. Page, 103 Me. 387, 69 A. 624, 18 L. R. A. (N. S.) 253, 125 Am. St. Rep. 307, 1 Bishop, New Crim. Proc. par. 211..... 54
Gouled v. U. S., 255 U. S. 309, 41 S. Ct. 261, 65 L. Ed. 647.28, 57

Hagen v. U. S., 4 Fed. 2d 801..... 36

Kirvin v. U. S., 5 Fed. 2d Ser. p. 282.....10, 11

Marron v. U. S., 8 Fed. Rep. 2d Ser. p. 251.....2, 10, 11
Marron v. U. S., 18 Fed. Rep. 2d Ser. p. 218..... 2, 11
Marron v. U. S., 9 Fed. 2d 251 (C. C. A. 9)..... 58

People v. Chiagles, 237 N. Y. 193, 142 N. E. 583, 32 A. L. R. 676.....54, 56

Sayers v. U. S., (C. C. A.) 2 Fed. 2d Ser. p. 146.....10, 13, 55
Silverthorne Lumber Company v. U. S. of A., 251 U. S. p. 385, 64 L. Ed. 319..... 18
State v. Mausert, 88 N. J. Law 286, 95 A. 991, L. R. A. 1916C, 1014 58
State v. Slamon, 73 Vt. 212, 50 Atl. 1097, 87 Am. St. Rep. 711 45

Pages

Steele v. U. S., (No. 1) 267 U. S. 498, 45 S. Ct. 414, 69 L. Ed. 757 55
Swan v. U. S., 54 App. D. C. 100, 295 F. 921 58

Twining v. New Jersey, 211 U. S. 78 (29 Sup. Ct. 14, 53 L. Ed. 97) 21

U. S. v. Friedberg, (D. C.) 233 Fed. 313 45
U. S. v. Hills, 263 Fed. 812 45
U. S. v. Kirschenblatt, 16 Fed. Rep. 2d p. 202 52
U. S. v. Kraus, (D. C.) 270 F. 579 54
U. S. v. Mills, 185 Fed. 318 39
U. S. v. Old Dominion Warehouse Co., 10 F. (2d) 736 (C. C. A. 2) 55
U. S. v. Porazzo Bros., 272 Fed. 276 45
U. S. v. Welsh, (D. C.) 247 F. 239, affirming 267 F. 819 (C. C. A. 2) 57
U. S. v. Wilson, (C. C.) 163 F. 338 22
U. S. v. Katz, 70 Ed. 554 51

Veeder v. U. S., 252 Fed. 414, 164 C. C. A. 338 59

Weeks v. U. S., 232 U. S. 383, 34 S. Ct. 341, 58 L. Ed. 652, L. R. A. 1915B, 834, Ann. Cas. 1915C, 1177 ..... 19, 55

In the Supreme Court
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OCTOBER TERM, 1926

No. 930

JOSEPH E. MARRON,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

BRIEF FOR PETITIONER.

PART I.
HISTORY OF THE CASE.

The case arose in the United States District Court for the Northern District of California, Southern Division. Joseph E. Marron was indicted together with certain other persons for conspiracy among themselves and with others to the grand jury unknown for committing an offense against the United States. The indictment charged a crime under Section 37 of the Criminal Code of the United States in that Marron and the other defendants at the City and County of San Francisco in the Southern Division of the North-

ern District of California on the first day of May, 1923 and up to the time of filing of said indictment to-wit: the 17th of October, 1924 conspired together to violate certain provisions of the act of Congress of August 28, 1919 commonly known as the National Prohibition Act. (Trans. pages 3-50.) On the 5th day of January, 1925 after trial in the United States District Court, with the exception of the defendant Brand, who was acquitted, Marron, together with defendants George Birdsall, Charles Mahoney, Patrick Kissane and Joseph Gorham, were found guilty on a general verdict. Subsequently Marron and the defendants Birdsall, Kissane and Gorham sued out writs of error to review the judgment of conviction and the said judgment was affirmed as to all the defendants with the exception of Marron and as to him the Court reversed the judgment and directed the lower Court to grant him a new trial. (*Marron v. U. S.*, 8 Fed. Rep., Second Series, p. 251.) In accordance with that mandate Marron was again tried in the United States District Court and sued out a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit to review the judgment of conviction upon which said judgment Marron was sentenced to be imprisoned for two (2) years in the United States penitentiary at Leavenworth, Kansas and in addition thereto to pay a fine in the sum of ten thousand ($10,000.00) dollars. (Trans. page 84.) On error to the said Circuit Court of Appeals the judgment of the said District Court was affirmed on December 13, 1926, and a rehearing was denied on the 31st day of January, 1927. (*Marron v. U. S.*, 18 Fed. Rep., Second Series.

page 218.) Thereafter and on February 24, 1927, Marron filed his petition for a writ of certiorari, to the United States Circuit Court of Appeals for the Ninth Circuit and annexed to said petition a brief in support of his application.

Thereafter and on the 18th day of April, 1927, this honorable Court did pursuant to the provisions of Section 240 of the Judicial Code grant the writ of certiorari.

THE FACTS IN THE INSTANT CASE.

The facts involved in the present controversy and the law as contended should be applied to the facts, has been in the judgment of counsel, comprehensively set forth in the petition for the writ of certiorari above referred to and the annexed brief filed in support thereof and consequently it is neither the aim nor the desire of counsel to indulge in needless repetition as to either the facts or law in the present brief.

However, in the orderly treatment of the facts and the presentation of the law it is deemed necessary that this Court have before it in the present brief the facts as disclosed by the record so as to enable it to intelligently consider the additional points of law about to be presented.

On the second day of October, 1924, and for some time prior thereto Marron was the lessee and occupant of those certain premises located at No. 1249 Polk Street in the City and County of San Francisco. On the first day of October, 1924, a Federal Prohibi-

tion Agent filed with the United States Commissioner for the Northern District of California his affidavit in the following words and figures, to wit:

"United States of America,
Northern District of California,
County of Alameda.—ss.

On this 1st day of Oct., 1924, before me, Albert M. Hardie, a United States Commissioner in and for the Northern District of California, personally appeared C. A. Howard, who being first duly sworn, deposes and says:

That he is and at all of the times herein mentioned was a Federal Prohibition Agent and as such makes this affidavit and presents the facts and circumstances hereinafter set out that heretofore came to the personal knowledge of and as positively known to affiant to exist.

That this affidavit is made for the purpose of having issued hereon and hereunder a search-warrant to search the following described premises and place, to wit: 1249 Polk St., San Francisco, Cal., including the entire second floor, flat or club, all rooms, lockers, closets, safes, shelves, sheds, drawers, basement, attic, pantries, cupbards, ice boxes. Entire premises, name of owner, or occupant, Eddie Marron.

That in and upon the aforesaid premises and place and on or about the 22nd day of Sept., 1924, intoxicating liquor as defined by Section 1 of Title II of the Act of October 28, 1919, known as the National Prohibition Act, containing one-half of one per centum or more of alcohol by volume and fit for use for beverage purposes, was then and there and now are kept, sold, possessed and bartered in violation of Title II of the said National Prohibition Act, and particularly in violation of Sections 3 and 21 of said Title II.

That affiant on or about the 22d day of September, 1924, visited the above and foregoing mentioned and described premises and purchased

from the person in charge in said premises certain intoxicating liquor, to-wit: Fifteen drinks of Bourbon whiskey for which he paid fifty cents each; description of person in charge of premises: height, 5 ft. 7 in.; weight, about 165 lbs.; age, 47 yrs.; large nose, deep set eyes, slightly gray hair, high cheek bones; male.

That it will be necessary to enter the said premises and place to search the same end every part thereof in order to secure the said intoxicating liquor therein for the United States Government and that it will be impossible to secure the same or any part thereof without the aid and use of a search-warrant.

Wherefore, affiant applies for and prays that a search-warrant to enter the said premises and place *and therein to search for the said intoxicating liquor* be issued pursuant to the statute in such cases made and provided.

C. A. Howard.

Subscribed and sworn to before me this 1st day of October, 1924.

Albert M. Hardie,
United States Commissioner in and for the Northern District of California."

(Trans. pages 55-57.)

Thereafter and on the first day of October, 1924, a search-warrant was issued by the said United States Commissioner for the Northern District of California based upon the affidavit hereinbefore referred to. The search-warrant set forth the usual formal averments and concluded with the following direction:

"Now, therefore, pursuant to Section 25 of Title II of the said National Prohibition Act, you are hereby authorized and empowered to enter the premises and place mentioned, referred to and described in said affidavit, and every part thereof, in the day or night time and to thoroughly search

the same for the following described property, to wit: Intoxicating liquor, to wit, alcohol, (jackass brandy, corn whiskey, wine of pepsin, neuropin, pepsin rennin, fermented grape juice), brandy wine, port wine, and spirituous, vinous, malt and fermented liquors, liquids and compounds by whatever name called containing one-half of one per centum or more of alcohol and fit for use for beverage purposes, stills, worms, coils, mashes, goosenecks, hydrometers, essences, caramel, coloring materials, boilers, and if found to seize the same and take it into your possession to the end that the said property may be thereafter dealt with according to law, and hereof to make due return with written inventory of the property taken by you or any or either of you, within ten days as required by law.

Witness my hand and official seal this 1st day of October, 1924.

Albert M. Hardie,
United States Commissioner in and for the Northern District of California."

(Trans. pages 57-59.)

A due return was made and the property seized upon the said premises as the result of the search was inventoried upon the back of the search-warrant which inventory described in detail the various brands of alcoholic liquors seized at that time. (Trans. pages 75-76.)

At the time of the search the prohibition agents seized and carried away with them a certain ledger referred to in the testimony as the "gray ledger". The ledger purported to be a record of the business carried on at 1249 Polk Street. It showed the gross receipts and expenses and also an inventory of the liquor on hand on said date together with numerous other entries.

At the same time and under the same circumstances the said Federal Prohibition Agents carried away with them numerous private memoranda and private papers of various descriptions principally telephone, gas, electric and water receipts. Neither the said ledger nor any of the other private memoranda were located upon the person of Marron who was not present at the time of the search and seizure or his co-defendant Birdsall who was present at the time the search was made and who was subsequently arrested by the Federal Prohibition Officers; but on the contrary the said ledger and other memoranda were located in a closet in the premises. (Trans. pages 91-131.) Prior to the time of trial of said cause petitioner Marron made and filed his petition for the return of his various books, papers and documents and made in accordance therewith motions to suppress any evidence that might be given upon the trial. These motions were denied by the lower Court and exceptions to such orders were duly taken. The motions are set forth at length in the transcript pages 327-354.

Upon the trial before the United States District Court these various private books of account, papers and documents above referred to were introduced into evidence over petitioner's objections and exceptions duly taken thereon. (Trans. pages 91-131.)

The gray ledger in particular was introduced into evidence as United States "Exhibit A" and testimony was given with relation thereto by Federal Prohibition Agents and others. (Trans. pages 90-132.)

SPECIFICATION OF OBJECTIONS TO THE SEARCH AND SEIZURE OF MARRON'S PRIVATE PROPERTY.

The various objections to the illegal search and seizure of the petitioner's private property and the subsequent introduction into evidence of the seized papers and memoranda are designated as follows:

"a. The seizure of the said papers, records, books of account and ledgers, was made in contravention of the rights of the petitioner under the Fourth Amendment to the Constitution of the United States of America, *for the reason that papers, records, books of account and ledger were not particularly described in the search-warrant as things to be seized, as required by the said amendment.*

b. The said papers, records, books of account and ledger were not instruments or fruits of crime, but, on the contrary, were and are the private memoranda, the private property and the private papers, documents and writings of the defendant.

c. The said purported search-warrant only authorized the said Federal Prohibition Agents to search the said premises for the following described personal property, to wit:

'Intoxicating liquor, to wit, alcohol, brandy, wine of pepsin, neuropin, pepsin rennin, fermented grape juice and spirituous, vinous, malt and fermented liquors, liquids and compounds by whatever name called containing one-half of one per centum or more of alcohol and fit for use for beverage purposes, stills, worms, coils, mashes, goosenecks, hydrometers, essences, caramel, coloring materials, boilers.'

d. The said Federal Prohibition Agents above referred to, were at the time of executing the warrant, unlawfully upon the premises and were at said time and said place trespassers in taking the said papers, records, books of account and ledger.

e. The said papers, records, books of account and ledger were not upon the person of the defendant, but on the contrary were located in the said premises, hereinabove referred to at a time when the defendant was not present.

f. There was neither identification of the said papers, records, books of account and ledger, nor probable cause alleged in the affidavit for the seizure of the papers, records, books of account and ledger, and that their taking was illegal and void."

It is admitted that neither the ledger nor any of the other private memoranda seized upon the occasion were described in either the warrant or the affidavit nor were they even remotely referred to. In fact the record discloses that the agents had completed the object of their visit when they had reduced to their possession the intoxicating liquors found upon the premises and that the seizure of the ledger and the other private documents was made after their authority under the search-warrant had been exhausted. The legal proposition, therefore, before this honorable Court may be stated as follows:

Were the private books of account, papers and documents in the possession of the officers of the United States as the result of an illegal search and seizure; and if so were the constitutional rights of Marron under the Fourth and Fifth Amendments to the Constitution of the United States of America violated by the reception into evidence over his objection of these private books of account, papers and documents?

We propose to demonstrate to this honorable Court by the citation of its own authority and precedents

from Courts of inferior federal jurisdiction that the seizure of Marron's private documents and memoranda was illegal and that his constitutional rights under the Fourth and Fifth Amendments to the Constitution of the United States were flagrantly and prejudicially violated by their reception into evidence over his timely objections.

It is conceded that the character of this particular search and seizure has caused and created an irreconcilable conflict as shall hereafter be pointed out in the decisions of certain particular Circuits and it is apparent that the fundamental rights of citizens in respect to the security of their private documents should not depend upon a divergence of views of Courts of similar jurisdiction.

The United States Circuit Court of Appeals for the Ninth Circuit in its decision in *Marron v. U. S.* (8 Fed. Rep., Second Series, page 251), arrives at conclusions that are diametrically opposed to the conclusions reached by the United States Circuit Court of Appeals in *Kirvin v. U. S.* (5 Fed. Sec. Series, page 282); it bottomed its conclusion upon several authorities, to which we shall hereafter advert, but it relied principally upon a decision of its own, namely:

> *Sayers v. U. S.*, (C. C. A.) 2 Fed. Second Series page 146.

When the question was again presented upon a writ of error the said Circuit Court of Appeals refused to consider the question on its merits and concluded that it was foreclosed from doing so by virtue of its former

decision. (*Marron v. U. S.*, 18 Fed. Rep. Second Series, page 218.)

It may be observed in passing, therefore, that the second Marron decision is of no assistance in the determination of the question.

The United States Circuit Court of Appeals for the Second Circuit in its opinion in the case of *Kirwin v. U. S.*, 5 Fed. Second Series, page 282 decided under identical facts to be hereinafter set forth that the rights of the petitioner under the Fourth and Fifth Amendments to the Constitution of the United States were violated.

Part II.

THE LAW.

POINTS AND AUTHORITIES.

Point One: *Kirvin v. U. S.*, 5 Fed. Second Series, page 282, clearly interprets the letter and the spirit of the Fourth and Fifth Amendments to the Constitution of the United States and its conclusions should be adopted and followed rather than the conclusions reached in *Marron v. U. S.*, 8 Fed. Rep., Second Series, page 251.

THE LAW OF MARRON v. U. S., 8 FED. REP. SECOND SERIES, PAGE 251 AND AN ANALYSIS OF THE AUTHORITIES RELIED UPON IN THE DECISION TO SUPPORT THE CONCLUSIONS FOUND THEREIN.

The United States Circuit Court of Appeals for the Ninth Circuit in *Marron v. U. S.*, 8 Fed. Rep., Second Series, page 251, decided that:

a. Because the Federal Prohibition Agents had authority to search the premises they had authority to seize everything of evidentiary value which they found.

b. That when the officers entered the premises they found defendant Birdsall in the unlawful possession of liquor and in the act of maintaining a common nuisance and hence that the said Birdsall was committing a misdemeanor in their presence and as an incident to a lawful arrest of Birdsall the agents were justified in searching his person and seizing the evidence of his guilt although the evidence showed that the books, papers and memoranda were not located on the person of Birdsall but on the contrary were located in a closet on the premises.

c. That because of the provisions of Section 10 of Title II of the National Prohibition Act (41 St. 312, Sec. 8351i of Barnes' Code 1924 Cupp.; U. S. Comp. St., Par. 10138½E), petitioner and his codefendants were required to keep and maintain such records for the purpose of public inspection at any reasonable time by a commissioner or any of his agents or any public prosecutor or by any person designated by him and that therefore such a book was unlike the private papers of a citizen.

d. That the said ledger and other private memoranda were the means and instruments of crime.

e. That the fact that the papers, books and documents were not particularly described in either the affidavit or search-warrant as provided for by the Fourth Amendment to the Constitution was immaterial under the circumstances.

An analysis of the Marron decision discloses that the learned author of that opinion relied upon the decision rendered by the same Court in the case of *Sayers v. U. S.*, (C. C. A.) 2 Fed. Second, page 146. In that case the defendant was convicted of unlawful possession and sale of intoxicating liquor. It appeared that certain Federal officers entered the hotel operated by the defendant at the time, and after having served the officers with whiskey she was arrested by them, the premises were searched and a large quantity of beer together with a meat bill in her kitchen and a record of her savings and of beer purchasers and her electric light bill was seized.

An examination of the case does not disclose whether the Federal officers at the time were possessed of a search-warrant. Nor does it appear that the defendant made and filed appropriate motions to prevent the United States from introducing into evidence the various private memoranda and papers seized from her.

It would appear that the objections to the search and seizure and the subsequent introduction into evidence of the private books and memoranda were not raised in the lower Court but on the contrary were presented for the first time upon appeal; this conclusion may be fairly deduced from reading the language of the Court at page 147 as follows:

> "This prima facie validity of evidence offered prevails, *unless the accused challenges it*, and at least develops circumstances sufficient to impeach it to a degree that inspires the discretion of the trial judge to embark upon further inquiry, in which event, on all evidence adduced, the prose-

cution must sustain the competency of its evidence."

It is worthy of comment to observe in passing, therefore, that in the *Sayers* case the defendant was convicted of the unlawful possession and sale of intoxicating liquor, while in the instant case Marron was convicted of a felony, to-wit: criminal conspiracy and it is a matter of conjecture as to whether or not the conclusion arrived at in the *Sayers* case would have been the same had the defendant properly and appropriately raised the point as to the legality of the seizure and admissibility of the private books, and memoranda when offered in evidence.

The portion of the opinion in the *Sayers* case material to the present discussion is found on page 147.

> "A lawfully arrested person may be searched for instruments, fruits, and evidences of the crime; and, if taken in commission of the crime in a building, the latter may be likewise searched to the extent that the offender's control and activities likely extended. This is the law since the Fourth Amendment, even as it was law before, is reasonable, and is not within the amendment's ban upon unreasonable searches and seizures. See Adam's Case, 192 U. S. 585, 24 S. Ct. 372, 48 L. Ed. 575; Week's Case, 232 U. S. 383, 34 S. Ct. 341, 58 L. Ed. 652, L. R. A. 1915B, 834, Ann. Cas. 1915C, 1177; Gouled's Case, 255 U. S. 309, 41 S. Ct. 261, 65 L. Ed. 647; U. S. v. Wilson (C. C.) 163 F. 338.
>
> In any such search, not only may the instruments and fruits of crime be seized but mere evidentiary articles, including papers incidentally discovered, may be likewise seized. This was expressly held in Adam's Case, supra, and has not been departed from in any qualification of said case. 'There is no special sanctity in papers, as

> distinguished from other forms of property, to render them immune from search and seizure, if only they fall within the scope of the principles of cases in which other property may be seized.' Gouled's Case, supra. Of a person arrested, every garment and pocket may be searched, and the same principle authorized that of a building, generally every room may be searched."

We are in accord with the academic principle that a person accused of crime may be searched, and instruments, fruits and evidences of crime may be seized from his person and from the premises in which the alleged crime has been committed, nor is a citation of authorities necessary to fortify the legality of seizures of the many evidences of crimes, of which the seizure of burglar tools and other *indicia* of crime offer typical examples.

But all of these cases are bottomed upon the assumption that the fruits and tools and other evidences of crimes have at first blush such a real and substantial relation to the crime or offense in the detection and apprehension of which the instrument was seized, that they form an integral part and parcel of the crime.

There is, however, such a real and substantial distinction between evidences of crime in the nature of burglar tools and articles of that character and private memoranda and documents of the character considered in the instant case, that the mere statement of their nature must, in and of itself, be sufficient to demonstrate the difference.

With great deference to the learned Judge who wrote the opinion in the *Sayers* case, we are con-

strained to assert that his conclusion finds no support in the authorities cited in the body of the opinion.

The importance of the question merits the consideration in detail of the authorities relied upon in the opinion.

ANALYSIS OF THE AUTHORITIES IN SAYERS v. U. S., 2 FED. SEC. 146.

In *Adams v. New York*, 192 U. S. 585, 48 Law Ed. 575, 24 Sup. Ct. Rep. 372, the plaintiff in error had been convicted in the Supreme Court of the State of New York for having in his possession certain gambling paraphernalia used in the game known as Policy in violation of the Penal Code of the State of New York. At the trial certain papers which had been seized by the police officers executing the search warrant for the discovery and seizure of policy slips, were offered in evidence over his objection. Pretermitting the question whether the Fourth and Fifth Amendments, applied to the action of the states, the Supreme Court proceeded to examine the alleged violations of the Fourth and Fifth Amendments, and based its decision upon the ground that the papers found in the execution of the search warrant, which warrant had a legal purpose in the attempt to find gambling paraphernalia, were competent evidence against the accused, and their offer in testimony did not violate his constitutional privilege against unlawful search and seizure, for it was held that such incriminatory documents thus discovered were not the subject of an unreasonable search and seizure, and, in fact, that the same were incidentally seized in the

lawful execution of a warrant, and not in a wrongful invasion of the home of a citizen, or the unwarranted seizure of his papers and property. It is interesting to note that the *Adams* case approved the doctrine that there was no valid objection to the use of papers that had been thus seized, and that the courts in the course of the trial would not make an issue to determine that question.

An examination of the case will disclose that no objection was taken at the trial to the introduction of the policy slips. The question raised was the receiving in evidence of private papers seized as a result of the search. The decision, however, did not turn upon this point so raised, but on the contrary turned upon a question of procedure as is illustrated by the following statement from the opinion:

> "In such cases the weight of authority, as well as reason limits the inquiry to the competency of the proffered testimony, and the Courts do not stop to inquire as to the means by which the evidence was obtained."

The opinion, therefore, assuming that the irregular seizure of private documents was immaterial in so far as their subsequent admission into evidence was concerned, *provided they bore some relation to the crime alleged*, proceeded to review various cases decided by the higher Courts of the different states to support their contention. The *Adams* case, therefore, made no attempt to discuss the nature or character of the documents so seized, and *in its conclusion discussed exclusively the relation of lottery tickets to gambling devices*, and to emphasize its position gave the favorite illustration of a search warrant being used for the

purpose of discovering stolen property and the incidental seizure of burglar tools in the execution of the seach warrant. We repeat with emphasis that the *Adams* case is no authority for the present proposition.

The law thus established by the *Adams* case, briefly stated, was that the admissibility of documentary evidence tending to establish the guilt of the accused of the offense charged, is not affected because it was secured in violation of the constitutional prohibition against unreasonable searches and seizures. This case was decided on February 23, 1904, and has been repeatedly cited and distinguished in a variety of cases from that time forward. It was not, however, until January 26, 1920, that the United States Supreme Court in the case of *Silverthorne Lumber Company v. United States of America*, 251 U. S. at page 385, 64 Law Ed. page 319, established a doctrine which, if not completely reversing the *Adams* case has in effect nullified the law as there established. Briefly stated, the facts were these: After an indictment had been returned against the plaintiff in error, he was arrested and detained in custody. While thus detained representatives of the Department of Justice, without the shadow of authority seized from his office certain books, papers and documents.

A timely application was made to the District Court for the return of the property, which was granted by the District Court, but photographs and copies of the originals having been taken were impounded. Subpoenas were thereupon served, requiring the production of the originals, and upon the refusal of the

plaintiff in error to obey, he was adjudged guilty of contempt of Court and fined. The Government, desiring to profit by its own wrong, sought to maintain its right to avail itself of the knowledge obtained by the illegal means of seizure, and hence to use the information obtained by that means, which it otherwise would not have had.

In its consideration of the question involved as to the admissibility in evidence of the documents wrongfully obtained and the compelling of the production of certain private papers, the opinion definitely disposed of the rule adopted in the *Adams* case in the following language:

> "The numerous decisions, like Adams v. New York, 192 U. S. 585, 48 Law Ed. 575, 24 Sup. Ct. Rep. at 372, holding that a collateral inquiry into the mode in which evidence has been got will not be allowed when the question is raised for the first time at the trial is no authority in the present proceedings. * * * *Now, whether some of these decisions have gone too far or have gone wrong it is unnecessary to inquire; the principle applicable to the present case seems to us plain.*"

We turn now to the consideration of the second authority relied upon in the *Sayers* case, namely, *Weeks v. United States*, 232 U. S. 383, 34 Sup. Ct. 341, 58 Law Ed. 652, and state, without fear of contradiction, that the *Weeks* case is not only opposed to the conclusion arrived at in the *Sayers* case, but on the contrary supports the position contended for by this plaintiff in error.

The defendant was arrested by a police officer without a warrant. The opinion states the facts as follows:

"Police officers had gone to the house of the defendant, and being told by a neighbor where the key was kept, found it and entered the house. They searched the defendant's room and took possession of various papers and articles found there, which were afterwards turned over to the United States marshal. Later in the same day police officers returned with the marshal, who thought he might find additional evidence, and being admitted by someone in the house, probably a boarder, in response to a rap, the marshal searched the defendant's room and carried away certain letters and envelopes found in the drawer of a chiffonier. Neither the marshal nor the police officers had a search warrant."

The defendant filed in the cause before the time for trial a petition for the return of the private papers, books and other property so seized. The opinion *inter alia* states as follows:

"The case in the aspect in which we are dealing with it involves the right of the court in a criminal prosecution to retain for the purposes of evidence the letters and correspondence of the accused, seized in his house in his absence and without authority, by a United States marshal holding no warrant for his arrest and none for the search of his premises. * * * If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and so far as those thus placed are concerned might as well be stricken from the Constitution. The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which had resulted in their embodiment in the fundamental law of the land. *The*

United States marshal could only have invaded the house of the accused when armed with a warrant issued as required by the Constitution, upon sworn information and describing with reasonable particularity the thing for which the search was to be made. Instead he acted without sanction of law, doubtless prompted by the desire to bring further proof to the aid of the government, and under cover of his office undertook to make a seizure of private papers in direct violation of the constitutional prohibition against such action. * * * We therefore reach the conclusion that the letters in question were taken from the house of the accused by an official of the United States acting under color of his office in direct violation of the constitutional rights of the defendant; that having made a seasonable application for their return, which was heard and passed upon by the court, there was involved in the order refusing the application a denial of the constitutional rights of the accused. In holding them and permitting their use upon the trial, we think prejudicial error was committed. As to the papers and property seized by the policemen, it does not appear that they acted under any claim of federal authority such as would make the amendment applicable to such unauthorized seizures. The record shows that what they did by way of arrest and search and seizure was done before the finding of the indictment in the federal court, under what supposed right or authority does not appear. What remedies the defendant may have against them we need not inquire, as the Fourth Amendment is not directed to individual misconduct of such official. Its limitations reach the federal government and its agencies. Boyd Case, 116 U. S. 616 (6 Sup. Ct. 524, 29 L. Ed. 746) supra, and see Twining v. New Jersey, 211 U. S. 78 (29 Sup. Ct. 14, 53 L. Ed. 97)."

It should be likewise noted that Mr. Justice Day who wrote the opinion in the *Adams* case was likewise

speaking for the Supreme Court in the *Weeks* case, and undoubtedly for the purpose of succinctly stating the principle decided in the *Adams* case, he used the following language in the *Weeks* case:

> "It is therefore evident that the Adams case affords no authority for the action of the Court in this case when applied to in due season for the return of papers seized in violation of the constitutional amendment. The decision on that case rests upon incidental seizure made in the execution of a legal warrant and in the application of the doctrine that a collateral issue will not be raised to ascertain the source from which the testimony competent in a criminal case comes."

Passing for the time the next case in order cited in the *Sayers* case, namely the *Gouled* case, we shall consider the last case cited, namely that of *United States v. Wilson*, 163 Fed. 338.

The decision in this case written by the District Judge arose as a result of the petition on behalf of the defendant for the return of certain personal property seized at the time of his arrest. It does not appear what was the nature of the accusation against the defendant, nor the character of the papers found in the trunk which were seized by the Government. It, therefore, is impossible to intelligently review that case for the purpose of distinguishing it from the instant case, but we respectfully direct the attention of this Court to the conclusion arrived at in the opinion, namely,

> *"assuming that the defendant was not entitled to return of the papers before the trial, and assuming further that the papers had not been obtained as the result of the unlawful search and seizure in violation of the Fourth Constitutional Amend-*

ment, nevertheless the objections were preserved to the defendant when the documents were offered as to their admissibility and on the ground that their use would be compelling the defendant to testify against himself contrary to the provisions of the Fifth Amendment."

Prior to our consideration and examination of the *Gouled* case, it is our intention to fortify our position in this respect with the authority of *Boyd v. United States*, 116 U. S. 630, 6 Sup. Ct. 524, 29 Law Ed. 746.

We refer to the *Boyd* case primarily for the purpose of having before us the clearest expression of the United States Supreme Court with respect to the sanctity of a man's private books and documents, together with the inception of the principles governing the limitations against unlawful searches and seizures and summary orders for the production of a man's private documents.

In the *Boyd* case a section of the Customs and Revenue Laws of the United States authorized the Court in the revenue cases, on motion of the Government's attorney to require the production by the defendant of certain books, records and papers in Court, otherwise the allegation of the Government's attorney as to their contents was to be taken as true. It was held that the act was unconstitutional, and void, and the principle definitely established that one cannot be compelled to produce his books and papers in a suit which seeks the forfeiture of his estate on pain of having the statement of Government's counsel as to the contents thereof taken as true and used as testimony for the Government.

The facts of the *Boyd* case and the principle established by it are not so important to us as are the reasons assigned by that tribunal in arriving at its conclusions.

Mr. Justice Bradley who delivered the opinion in that case undoubtedly regarded the principle involved, to-wit, the compulsory production of a man's private records, of such magnitude and importance, that he reviewed in detail the history of the law relating to searches and seizures, and from his research upon this subject this monumental epic of American jurisprudence resulted. The question involved in the case is presented in the following language:

> "The principal question, however, remains to be considered. Is a search and seizure or, what is equivalent thereto, a compulsory production of a man's private papers, to be used in evidence against him in a proceeding to forfeit his property for alleged fraud against the revenue laws—is such a proceeding for such a purpose an '*unreasonable* search and seizure' within the meaning of the Fourth Amendment of the Constitution? Or is it a legitimate proceeding? It is contended by the counsel for the Government that it is a legitimate proceeding, sanctioned by long usage, and the authority of judicial decision. No doubt long usage acquiesced in by the courts, goes a long way to prove that there is some plausible ground or reason for it, in the law or in the historical facts which have imposed a particular construction of the law favorable to such usage. It is a maxim that *Consuetudo est optimus interpres legum:* and another maxim that *Contemporanea expositio est optima et fortissima in lege.* But we do not find any long usage or any contemporary construction of the Constitution which would justify any of the Acts of Congress now under consideration. As stated before, the Act of 1863

was the first Act in this country, and we might say either in this country or in England, so far as we have been able to ascertain, which authorized the search and seizure of a man's private papers or the compulsory production of them, for the purpose of using them in evidence against him in a criminal case, or in a proceeding to enforce the forfeiture of his property. Even the Act under which the obnoxious writs of assistance were issued, did not go as far as this, but only authorized the examination of ships and vessels and persons found therein, for the purpose of finding goods prohibited to be imported or exported, or on which the duties were not paid; and to enter into and search any suspected vaults, cellars, or warehouses for such goods. *The search for and seizure of stolen or forfeited goods or goods liable to duties and concealed to avoid the payment thereof are totally different things from a search for and seizure of a man's private books and papers for the purpose of obtaining information therein contained, or of using them as evidence against him. The two things differ toto coelo. In the one case the Government is entitled to the possession of the property; in the other it is not.* * * * But when examined with care, it is manifest that there is a total unlikeness of these official acts and proceedings to that which is now under consideration. In the case of stolen goods, the owner from whom they were stolen is entitled to their possession; and in the case of excisable or dutiable articles, the Government has an interest in them for the payment of the duties thereon, and until such duties are paid has a right to keep them under observation, or to pursue and drag them from concealment; and in the case of goods seized on attachment or execution, the creditor is entitled to their seizure in satisfaction of his debt; and the examination of a defendant under oath to obtain a discovery of concealed property or credits is a proceeding merely civil to effect the ends of justice, and is no more than what the court of

chancery would direct on a bill for discovery; whereas, by the proceeding now under consideration, the court attempts to extort from the party his private books and papers to make him liable for a penalty or to forfeit his property."

The opinion reviews and quotes at length from Lord Camden's memorable discussion of the subject in *Entick v. Carrington,* reported in 19 Howell, St. Tr. 1029. The opinion states *inter alia:*

"Papers are the owner's goods and chattels; they are his dearest property; and are so far from enduring a seizure that they will hardly bear an inspection; and though the eye cannot by the laws of England be guilty of a trespass, yet, where private papers are removed and carried away the secret nature of those goods will be an aggravation of the trespass, and demand more considerable damages in that respect. Where is the written law that gives any magistrate such power? I can safely answer, there is none; and, therefore, it is too much for us, without such authority, to pronounce a practice legal which would be subversive of all the comforts of society.

"But though it cannot be maintained by any direct law, yet it bears a resemblance, as was urged, to the known case of search and seizure for stolen goods. I answer that the difference is apparent. In the one I am permitted to seize my own goods, which are placed in the hands of a public officer, till the felon's conviction shall entitle me to restitution. In the other, the party's own property is seized before and without conviction, and he has no power to reclaim his goods, even after his innocence is declared by acquittal.

"The case of searching for stolen goods crept into the law by imperceptible practice. No less a person than my Lord Coke denied its legality (4 Inst. 176); and, therefore, if the two cases resembled each other more than they do, we have no

right, without an Act of Parliament, to adopt a new practice in the criminal law which was never yet allowed from all antiquity. Observe, too, the caution with which the law proceeds in this singular case. There must be a full charge upon oath of a theft committed. The owner must swear that the goods are lodged in such a place. He must attend to the execution of the warrant, to show them to the officer, who must see that they answer the description. * * *

"If it should be said that the same law which has with so much circumspection guarded the case of stolen goods from mischief, would likewise in this case protect the subject by adding proper checks; would require proofs beforehand; would call up the servant to stand by and overlook; would require him to take an exact inventory, and deliver a copy, my answer is that all these precautions would have been long since established by law, if the power itself had been legal; and that the want of them is an undeniable argument against the legality of the thing. * * *

"Lastly, it is urged as an argument of utility, that such a search is a means of detecting offenders by discovering evidence. I wish some cases had been shown, where the law forceth evidence out of the owner's custody by process. There is no evidence against papers in civil causes. It has been often tried but never prevailed. Nay, where the adversary has by force or fraud got possession of your own proper evidence, there is no way to get it back but by action. In the criminal law such a proceeding was never heard of; and yet there are some crimes, such, for instance, as murder, rape, robbery and house breaking, to say nothing of forgery and perjury, that are more atrocious than libeling. But our law has provided no paper search in these cases to help forward the conviction. Whether this proceedeth from the gentleness of the law towards criminals, or from a consideration that such a power would be more

> pernicious to the innocent than useful to the public, I will not say. It is very certain that the law obligeth no man to accuse himself because the necessary means of compelling self accusation, falling upon the innocent as well as the guilty, would be both cruel and unjust; and it would seem that search for evidence is disallowed upon the same principle. Then, too, the innocent would be confounded with the guilty."

The concluding reference in the opinion is likewise of importance in our consideration of the violation claimed under the Fifth Amendment. At page 752, Law Ed., we find the following language:

> "We have already noticed the intimate relation between the two Amendments. They throw great light on each other. For the 'unreasonable searches and seizures' condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment; and compelling a man 'in a criminal case to be a witness against himself', which is condemned in the Fifth Amendment, throws light on the question as to what is an 'unreasonable search and seizure' within the meaning of the Fourth Amendment. And we have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself. We think it is within the clear intent and meaning of those terms."

We turn now to consideration of *Gouled v. United States*, 255 U. S. 298, 41 Sup. Ct. 261, 65 Law Ed. 647, which decision in our judgment, is complete authority for the contention now being urged on behalf of the plaintiff in error.

This case has been cited as authority in numerous decisions since the date of its rendition on the 28th of October, 1921, and it has unquestionably become the leading case upon the question of searches and seizures throughout the United States.

An examination of the case will disclose that six questions were certified to the Court by the United States Circuit Court of Appeals for the Second Circuit.

Briefly stated, the facts were that the plaintiff in error Gouled, one Vaughan and an attorney at law were charged with being parties to a conspiracy to defraud the United States in violation of Section 37 of the Federal Criminal Code, and in the second Count in the indictment were charged with having used the mails to promote a scheme to defraud the United States in violation of Section 215 of the Code. Gouled was convicted. An appeal was prosecuted, and the matter came before the United States Supreme Court for a certification of six questions.

The first two questions concerned the admission in evidence of a paper surreptitiously taken from the office of Gouled by officers of the Intelligence Department of the Army. With this feature of the case, namely, the surreptitious and furtive taking of a man's papers, we have no concern.

The remaining four questions, however, related to papers taken from the defendant's office *under two valid search-warrants,* and it is with these questions that we are vitally concerned.

The *Gouled* case, therefore, may be definitely segregated and construed as establishing two propositions, namely (Firstly), Surreptitious and furtive taking of a man's private documents; and (Secondly) the seizing of them *under a valid search-warrant*.

The private documents of Gouled, seized under the search-warrant, consisted of an unexecuted form of contract between him and one Lavinsky; a written contract executed by the defendant and one Steinthal, and the third a bill for disbursements and professional services rendered by an attorney at law for and on behalf of Gouled. These various documents were alleged in the petition upon which the search-warrant was issued, to have been used in the commission of a felony, to-wit, the bribery of an officer of the United States; it was further alleged in another affidavit that Gouled had at his office certain letters, papers and documents and writings which were related to and had been used in the commission of a felony, to-wit, conspiracy to defraud the United States, upon which charge the defendant Gouled was before the Court.

Subsequent to the seizure of these papers, an indictment was returned and prior to the trial a motion was made on behalf of Gouled for the return of the papers seized under the search-warrant, which motion was denied.

A duplicate original of the Steinthal contract and the original Lavinsky contract, together with the bill for attorney's fees, were offered and admitted into evidence over the Constitutional objections of Gouled, to-wit, the violation of his rights under the Fourth and Fifth Amendments.

Mr. Justice Clark, in his conclusion, made plain the distinction between a search for stolen and forfeited property, counterfeit coins, burglar tools, weapons, implements of gambling and other things of like character. Unquestionably these things were enumerated expressly in the opinion to emphasize the distinction between them and the private books, writings and documents of a citizen, and he likewise was careful to preserve the rights of seizure under search-warrants of private papers, but he added:

> "they may be resorted to only when the primary right of such search and seizure may be found in the interest which the public or complainant may have in the property to be seized, but not the right to the possession of it, or where the valid exercise of the police power renders possession of the property by the accused unlawful, and provides that it may be taken (Boyd v. United States).
>
> "There is no special sanctity in papers as distinguished from other property to render them immune from search and seizure *if only they fall within the scope of the purpose of the cases in which other property may be seized and if they be adequately described in the affidavit and warrant.*"

The third question certified for consideration is, in the language of the opinion, as follows:

> "Are papers of no pecuniary value, but possessing evidential value against persons presently suspected and subsequently indicted under Secs. 37 and 215 of the United States Criminal Code when taken under search warrants issued pursuant to the Act of June 15th, 1917, from the house or office of the person suspected,—seized and taken in violation of the 4th Amendment?
>
> That the papers involved are of no pecuniary value is of no significance. Many papers, having

no pecuniary value to others, are of the greatest possible value to the owners, and are property of a most important character. (Boyd Case, 116 U. S. 627, 628, 29 L. Ed. 749, 750, 6 Sup. Ct. Rep. 524); and since those here involved possessed 'evidential value' against the defendant, we must assume that they were relevant to the issue.

Restraining the questions to the papers described, and first, as to the unexecuted form of contract with Lavinsky, a stranger to the indictment: While the contents of this paper are not given, it is impossible to see how the government could have such an interest in such a paper that, under the principles of law stated, it would have the right to take it into its possession to prevent injury to the public from its use. The government could desire its possession only to use it as evidence against the defendant, and to search for and seize it for such purpose was unlawful.

Likewise the public could be interested in the bill of the attorney for legal services only to the extent that it might be used as evidence, and the seizure of this also was unlawful.

As to the contract with Steinthal, also a stranger to the indictment: It is not difficult, as we have said, to imagine how an executed written contract might be an important agency or instrumentality, in the bribing of a public servant, and in perpetrating frauds upon the government, so that it would have a legitimate and important interest in seizing such a paper in order to prevent further frauds upon the government, but the facts necessary to give this contract such a character do not appear in the certificate. On the contrary, this third question recites that the papers are all of no pecuniary, but are of evidential value, and in the sixth question it is recited that they are 'of evidential value only', so that it is impossible to say, on the record before us, that the government had any interest in it other than an evidence against the accused; and

therefore, as to all three papers, the answer to the question must be in the affirmative."

The fourth question reads:

"If such papers, so taken, are admitted in evidence against the person from whose house or office they were taken, such person being then on trial for the crime for which he was accused in the affidavit for warrant,—is such admission in evidence a violation of the Fifth Amendment?

The same papers being involved, the answer to this question must be in the affirmative; for, they having been seized in an unconstitutional search, to permit them to be used in evidence would be, in effect, as ruled in the Boyd case to compel the defendant to become a witness against himself."

The next question in order for consideration related to the violation of the defendant's rights under the Fifth Amendment by the subsequent admission of the seized documents into evidence, and in the language of the opinion.—

The fifth question reads:

"If, in the affidavit for search warrant under Act of June 15, 1917, the party whose premises are to be searched be charged with one crime, and property be taken under the warrant issued thereon, can such property so seized be introduced in evidence against said party when on trial for a different offense?

It has never been required that a criminal prosecution should be pending against a person in order to justify search for and seizure of his property under a proper warrant, if a case of crime having been committed and of probable cause is made out, sufficient to satisfy the law and the officer having authority to issue it, and we see no reason why property seized under a valid search warrant, when thus lawfully obtained by

> the government, may not be used in the prosecution of a suspected person for a crime other than that which may have been described in the affidavit as having been committed by him. The question assumes that the property seized was obtained on a search warrant sufficient in form to satisfy the law; and if the papers to which the question refers had been of a character to be thus obtained, lawfully, it would have been competent to use them to prove any crime against the accused as to which they constituted relevant evidence."

The sixth question inquired as to the duty of the trial Court to inquire into the origin of and the method adopted in procuring the papers when the documents are offered in evidence against the party indicted. The Court answered the question as follows:

> "The papers being of 'evidential value only' and having been unlawfully seized, this question really is, whether, it having been decided on a motion before trial that they should not be returned to the defendant, the trial court, when objection was made to their use on the trial, was bound to again inquire as to the unconstitutional origin of the possession of them. It is plain that the trial court acted upon the rule, widely adopted, that courts in criminal trials will not pause to determine how the possession of evidence tendered has been obtained. While this is a rule of great practical importance, yet, after all, it is only a rule of procedure, and therefore it is not to be applied as a hard-and-fast formula to every case, regardless of its special circumstances. We think, rather, that it is a rule to be used to secure the ends of justice under the circumstances presented by each case; and where, in the progress of a trial, it becomes probable that there has been an unconstitutional seizure of papers, it is the duty of the trial court to entertain an objection to their admission, or a motion for their exclusion,

> and to consider and decide the question as then presented, even where a motion to return the papers may have been denied before trial. A rule of practice must not be allowed for any technical reason to prevail over a constitutional right."

Whether or not this language may be construed as a complete disapproval of the doctrine laid down in the *Adams* case becomes immaterial if it be conceded that the papers were in the first instance illegally taken.

It will be observed that in none of the authorities that we have reviewed up to the present, which authorities have been relied upon by the United States Circuit Court of Appeals for the Ninth Circuit in support of its conclusion, has the proposition involved in this case, been directly passed upon, namely the *failure of the search-warrant to describe the article or thing to be seized.*

We turn now to a consideration of the authorities relied upon by Marron in support of his position.

THE SEIZURE OF THE PAPERS, RECORDS, BOOKS OF ACCOUNT AND THE LEDGER WAS MADE IN CONTRAVENTION OF THE RIGHTS OF MARRON UNDER THE FOURTH AND FIFTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA, FOR THE REASON THAT SAID PAPERS, RECORDS, BOOKS OF ACCOUNT AND LEDGER WERE NOT PARTICULARLY DESCRIBED IN THE SEARCH-WARRANT AS THOSE TO BE SEIZED AS REQUIRED BY THE SAID AMENDMENTS.

The law governing seizures and searches and warrants as appearing in the Fourth Article of the Amendment to the Constitution of the United States is as follows:

> "Section I. The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated, and no warrants shall issue but upon reasonable cause supported by oath or affirmation, *and particularly describing the* place to be searched and the persons or *things* to be seized."

The Fifth Article of Amendments to the Constitution relating to criminal proceedings and condemnation of property reads:

> "Section I. No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of grand jury, except in cases arising in the land or naval forces or in the militia when in actual service in time of war or public danger; nor shall any person be subject, for the same offense, to be twice put in jeopardy of life or limb; *nor shall be compelled in any criminal case to be a witness against himself;* nor be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation."

The significance of the language of the Fourth Amendment "particularly describing the place to be searched and the persons or things to be seized" is of supreme importance in guiding us in our endeavor to demonstrate the violation of the rights of the petitioner under this amendment.

Innumerable decisions of our Federal Courts have construed their meaning, and we are not compelled to go far afield in our research for decisions to fortify our position. In fact, the Circuit Court of Appeals for the Ninth Circuit, in the case of *Hagen v. U. S.,*

4 Fed. 2d. 801, had occasion to consider a similar contention under facts which bear a startling similarity to the facts in the instant case, and it is worthy of comment that the *Hagen* case was not referred to by the learned Judge who wrote the opinion in the first *Marron* case.

The facts in the *Hagen* case were briefly these: A prohibition agent testified that he went to the dwelling house of defendant Hagen and, after serving the search-warrant upon him, proceeded to search his house and found therein certain intoxicating liquors. In addition to the seizure of these intoxicating liquors, the agents likewise seized a certain book, together with some papers and cards which were subsequently introduced into evidence upon his trial for conspiracy to violate the National Prohibition Act. The question before the Circuit Court concerned the validity of the search-warrant.

The Commissioner issued the warrant, commanding the prohibition officer to enter the premises described in the affidavit and to then and there diligently "investigate and search the same, and into and concerning said crime, and to search the person of said Ed. Hagen and employees, and from him or her, or from said premises, seize any and all of the said property so used in or about the commission of said crime, and then and there take the same into possession, and a true report make".

The officer returned the warrant, stating that he had found certain described quantities of whiskey and beer and various letters, books, papers, cards and ac-

counts in possession of the various defendants. It appears, therefore, that both the affidavit and the search-warrant were broader in the *Hagen* case than they were in the *Marron* case, for the reason that in the *Hagen* case they specifically referred to property used as the means of committing a crime, and the officer who made a return on the search-warrant likewise described the seizure of said private books and memoranda which was not done by the officer who made the return upon the warrant in the *Marron* case. In reversing the judgment of conviction for the crime of conspiracy against Hagen, the Circuit Court of Appeals for the Ninth Circuit condemned the search and seizure in the following language:

> "Nor was there any statement that in the house there were documents or books or memoranda tending to show unlawful sale of intoxicating liquor, *or that Hagen had in his personal possession any writings or other evidence connecting him with a violation of the prohibition law, nor was there any attempt to describe the books or documents or papers to be seized from Hagen, or anybody else.*"

That Hagen's rights under the Fifth Amendment to the Constitution were violated by the reception into evidence of these private memoranda and books of account, was likewise affirmed in the decision with this language:

> "The legal effect of such a search and seizure of papers was to force the person seized to become the unwilling source of evidence against himself, and put him in a position where he can invoke that protection afforded him by the Fourth and Fifth Amendments to the Constitution and by the Acts of Congress."

We again call to the attention of this Honorable Court the undisputed fact that the search-warrant in the instant case described no article or thing other than intoxicating liquors and paraphernalia used in their manufacture.

As stated above, the learned Judge who wrote the original *Marron* opinion not only failed to recognize the doctrine in the *Hagen* case, but neglected to even comment upon the principle involved therein.

We invite attention to the case of the *United States v. Mills,* 185 Fed. 318. This proceeding came before the Circuit Court of New York on the petition for instructions to be directed to the United States Marshal, of that District, and the District Attorney, to return to defendants certain books and papers which had been seized pursuant to a bench-warrant.

The defendants were co-partners and were indicted for conspiracy to defraud the United States as a result of false and fraudulent invoices alleged to have been made by them on foreign merchandise. A bench-warrant for the arrest of the defendants was issued, and the Marshal, in addition to arresting the defendants, searched for, found, seized and removed from the premises of the defendants a large number of books and papers, which were subsequently delivered to the District Attorney.

The bench-warrant referred to in the opinion commanded the Marshal to arrest the three defendants, describing particularly the persons to be seized, but not particularly describing the place to be searched and the *things to be seized.*

The Court said (page 319):

"When executing the bench-warrant, the marshal seized not only the documents concerned in the particular importation of December 3, 1906, but also all the books and papers of the firm covering their business above referred to. Having examined these, the district attorney states that they disclose evidence of further offenses, as to which he is about to advise the grand jury that 'further indictments, charging additional offenses than those contained in the indictment already found, could be found'.

It may be highly desirable, from the point of view of a prosecuting officer, that some such comprehensive seizure of a person's books and papers should be had; the trial of an offense thus charged may be thus facilitated, and it may be easier to discover that the same person has been guilty of other similar offenses. It may promote the ends of justice that the right to search and seize should be strengthened rather than impaired. It may be that there is 'much less danger of doing injustice to the individual than there is of overlooking the obligations of those in authority to organized society'. Opinions will differ as to which is the wiser public policy. But, whatever may be one's individual opinion, it is difficult to see how a subordinate federal court can sustain such a wholesale seizure as we have here, so long as the decision of the Supreme Court in Boyd v. U. S., 616, 6 Sup. Ct. 524, 29 L. Ed. 746, remains unreversed and unqualified. It certainly has never been reversed, and the subsequent decisions of the Supreme Court in which it has been referred to do not indicate that the practice followed in this case should be approved.

In Adams v. New York, 192 U. S. 585, 24 Sup. Ct. 372, 48 L. Ed. 575, the court is careful to point out that the only question before it was as to the introduction in testimony of papers found on defendant's premises at the time of his arrest."

A similar question was presented to the United States Circuit Court of Appeals of the Second Circuit, in the case of *Fitter et al. v. United States,* 258 Fed. 567. The facts were as follows:

The defendant claimed that he was forced to furnish incriminating evidence against himself, and that he was convicted upon evidence secured in an unlawful and illegal manner and in violation of his constitutional rights. It appears that, acting under instructions given by the United States Attorney or his assistant, an officer belonging to the United States Secret Service came to the defendant's place of business in the absence of Fitter, and demanded that Fitter's wife allow him to examine the ledger, delivery slips, receipts, and check books. This demand was complied with, and certain slips and papers were taken away. An hour later an automobile drove up, and two men entered the store, one of whom wore a naval uniform, the other one said he was a secret service agent. They entered the back office and called for "Ledger, ledger, contract ledger". Mrs. Fitter at that time was working on the ledger. The man in uniform grabbed the ledger and carried it out of the store. And as the two left, one of the men said he was going to bring the ledger back after comparing it with the delivery slips. Mrs. Fitter did not see the delivery slips, papers and contract ledger again, however, until she saw them in the office of the United States Attorney on November 27, 1917.

On November 14, 1917, four days after the illegal seizure of the defendant's ledger and papers, the

United States Attorney for the Eastern District of New York was requested to return the ledger, and an offer was made to preserve the ledger in its then condition. No attention was paid to this request, and the ledger was not returned.

Thereafter, and before the trial of this action, a motion was made for the return of the ledger, papers, and slips which had been unlawfully seized, and by direction of the Court the ledger and some of the papers were turned over by the United States Attorney to counsel for the defendant.

Neither of the men who examined the defendant's books and papers had a search-warrant authorizing them to examine or to seize either the books or the papers. The testimony of the officers is that no forcible seizure was made, but that a request was made which was acceded to by Fitter's wife. What was done was undoubtedly an arbitrary and unlawful violation of Fitter's constitutional rights. The Fourth Amendment to the Constitution provides:

> "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fifth Amendment, provides, *inter alia*, that no person—

> "shall be compelled in any criminal case to be a witness against himself".

In the *Petition of Barber,* 281 Fed. 550, the facts were practically identical with the facts in the instant case, and it is difficult to perceive how a distinction may be drawn between the principles controlling this case and the principles for which we are contending in the present case.

The *Barber* case arose as a result of a petition filed, seeking the return of certain malt, hops, rye, sugar, bottles, and other paraphernalia intimately connected with the manufacture and disposition of intoxicating liquor, *together with certain books, letter files, ledgers, papers, records, advertising matter, and stationery used in the conduct of the business of petitioner, namely, selling hops, malt, materials, supplies and other merchandise which he alleged were unlawfully seized and taken from his place of business in the City of Detroit.* The affidavit upon which the search-warrant was issued is quoted at length in the opinion, as is likewise the search-warrant material to our discussion.

> "Now, therefore, in pursuance with the provision of the law and particularly the National Prohibition Act, relating to the prohibition of the sale and possession of malt, hops, capping machines, caps, bottles and other utensils and property designed for the manufacture of liquor intended for use in violating the National Prohibition Act, and upon probable cause shown, you are hereby authorized to enter the said premises in the day with the necessary and proper assistance, and thoroughly search the premises aforesaid for all subjects and evidence of fraud against the government of the United States and for violation of the National Prohibition Act, including the property above mentioned, to the end that

such violations may be discovered and restrained, and that all offenders and property forfeited may be dealt with according to law, and hereof make due return without delay.

"Witness, the hand and the official seal of the said commissioner, at Detroit, Michigan, in said district, this 3rd day of March, A. D. 1922.

(Signed) J. Stanley Hurd,
United States Commissioner, Eastern District of Michigan."

Various objections were raised by Barber as to the validity of the search-warrant, among one of which was the following:

"That said search warrant did not expressly command the seizure of the property found by the search, but left indefinite and discretionary the property to be seized by the search."

The Court's disposition of various objections is not germane to this discussion, excepting the conclusion arrived at, based upon the objection hereinbefore set forth.

"* * * It is not claimed by petitioner that any person was misled or prejudiced by such description, and I cannot doubt that the objection based upon the alleged indefiniteness of description of such property or supposed variance between the property so described and the property seized must be overruled, except as to the books, files, ledgers, records, advertising matter, stationery, and papers seized, but not described nor mentioned in the affidavit or in the search warrant.

It is plain that, as the latter were not described nor even mentioned in the affidavit or search-warrant, their seizure thereunder was unauthorized for that reason, even if otherwise subject to

seizure, and if, actually seized and still retained, they must be forthwith returned to petitioner. United States v. Mills, 185 Fed. 318; Fitter v. United States (C. C. A. 2), 258 Fed. 567, 169 C. C. A. 507."

In *United States v. Hills,* 263 Fed. 812, the proposition is so succinctly stated that we take the liberty of quoting the decision in full:

"It appearing, upon inspection, that the description in the search warrant contained of the things to be seized thereunder did not embrace any papers or documents of the defendant, and that therefore it was not broad enough to include the letter from Alonzo Taylor to the defendant, dated April 14, 1919, the defendant was on his petition heretofore filed herein, entitled to a return of the said letter, and an order may be so taken. Weeks v. United States, 232 U. S. 383, 34 Sup. Ct. 341, 58 L. Ed. 652, L. R. A. 1915B, 834, Ann. Cas. 1915C, 1177; U. S. v. Friedberg (D. C.), 233 Fed. 313; State v. Slamon, 73 Vt. 212, 50 Atl. 1097, 87 Am. St. Rep. 711.

And it further appearing that the said letter was improperly admitted in evidence against the defendant's exception, and that the same was prejudicial to the defendant, the verdict will be set aside, and a new trial of this cause granted."

See also:

Amos v. U. S., 255 U. S. 313, 41 Sup. Ct. 266, 65 L. Ed. 654;

U. S. v. Porazzo Bros., 272 Fed. 276.

KIRVIN v. UNITED STATES, 5 FED. 2d 282, SHOULD BE FOLLOWED AS AN AUTHORITY ON THE FACTS IN THE INSTANT CASE RATHER THAN THE FIRST DECISION IN MARRON v. UNITED STATES, 8 FED. 2d 251.

Judge McCamant, the author of the opinion in the *Marron* case, disposed of the law as enunciated in the *Kirvin* case, with the following language at page 256 of the report:

> "The defendants rely on Kirvin v. U. S. (C. C. A. 2), 5 Fed. 282. It may be conceded that this decision cannot be reconciled with the views above expressed. We have great respect for the Court which handed down this opinion, but we prefer to follow our own precedents. We still think that Sayers v. U. S., 2 Fed. 2d 146, was correctly decided."

The *Kirvin* case came before the Circuit Court of the 2nd Circuit under the following circumstances: An application had been made by Harold A. Kirvin to quash, vacate and set aside a search-warrant affecting the premises located at No. 191 Front Street, Borough of Manhattan, City of New York, and for a return of records, papers and documents seized thereunder. The original application was made before the United States Commissioner who sustained the application. Thereupon the District Court of New York reviewed the action of the United States Commissioner and duly gave his order reversing the action of the Commissioner. Thereafter the petitioner appealed to the United States Circuit Court of Appeals, which Court in turn reversed the action of the United States District Court. The facts briefly are these: A search-warrant was issued on the 18th day of De-

cember, 1923, by one of the United States Commissioners for the Southern District of New York. The affidavit upon which the search-warrant was issued alleged an unlawful sale of intoxicating liquor upon these premises and concluded with the averment that it was necessary to procure a search-warrant to search the said premises and to seize all intoxicating liquor found therein, *together with any books, papers, records, or documents pertaining to the sale, possession or transportation of intoxicating liquors.*

A search-warrant was thereupon issued on the affidavit above referred to and after describing the premises to be searched directed the officers to search diligently "for said liquors and records" and directed the making of a return if any seizure was made under said warrant.

A seizure was made and resulted in obtaining a quantity of liquor and also a large list of books, papers and records consisting of many telegrams, invoices, receipts and various letters.

It is worthy of comment at this time to state that not only the affidavit in this case but the search-warrant itself directed the officers to seize not only the liquor in question, but contained likewise an omnibus direction to seize records, papers and documents; it would appear therefore that the search-warrant was to that extent more comprehensive than the search-warrant in the instant case, for here the warrant is silent as to things to be seized other than intoxicating liquors and paraphernalia used in their manufacture. The first contention made in the *Kirvin* case, and the

first contention made by the Government in the instant case, that as to the records seized, the search-warrant was issued without probable cause, is answered by that learned Court in the following language:

> "We need not consider the sufficiency of the allegations as to the liquor seized for that seizure is not now questioned. The affidavit in no place refers to any record being used in connection with the sale of alcohol, and there is no description of the records, papers, or memoranda of any kind. The only reference to it is in the last few lines in the affidavit, which says, 'and to seize all intoxicating liquors found therein, together with any papers, books, records or documents pertaining to the sale, possession or transportation of intoxicating liquors'. This allegation does not warrant the seizure of papers nor could any testimony before the commissioner supply what is here missing."

One of the arguments of the Government in that case, and the principal argument of the Government in this case, which contention the learned Judge who wrote the opinion for this Court in the *Marron* case, evidently adopted, was that the records, papers and documents so seized were means or instruments or fruits of crime.

We can do no better than to quote the language of the *Kirvin* case in answer to this contention:

> "We cannot agree with the government's argument that the records were means or an instrument of crime. They might be some evidence of crime. Gouled v. U. S., 225 U. S. 310, 41 S. Ct. 261, 65 L. Ed. 647. *The legality of the search-warrant may become the very foundation upon which the successful prosecution of a guilty defendant depends. The constitutional rights guaranteed by the Fourth Amendment of the Consti-*

tution must be equally enforced in favor of the guilty and innocent. Unless sufficient facts are shown under oath to support the finding of a probable cause, the right of a person to be secure from unreasonable searches and seizures must not be violated. Silverthorne Co. v. U. S., 251 U. S. 385, 40 S. Ct. 182, 64 L. Ed. 319; Weeks v. U. S., 232 U. S. 383, 34 S. Ct. 341, 58 L. Ed. 652, L. R. A. 1915B, 834, Ann. Cas. 1915C, 1177; Boyd v. U. S., 116 U. S. 616, 6 S. Ct. 524, 29 L. Ed. 746. A search-warrant must be as broad, and no broader, than justifying the basis of fact. It is not every kind of property that may be seized, under a search-warrant. It is intended that the warrant be issued with the privilege to seize such property as was used as the means of committing a felony. *All papers and documents which afford evidence that a felony has been committed, but which were not the means of committing it, are immune from seizure.* Veeder v. U. S., 252 Fed. 414, 164 C. C. A. 338."

The next contention of the Government in the *Kirvin* case was that the officers who were executing the warrant were lawfully on the premises, and, being there, they might seize the papers in question. That contention is answered in the following language:

> "But as to the records they had no search-warrant. They were as trespassers in taking these documents."

The next contention was that the plaintiff in error, Kirvin, was arrested at the time the papers were seized and therefore the seizure was lawful.

> "But the papers were not on his person, and the distinction has been recognized between what one carries about on his person and what one keeps in his house. A search-warrant cannot be extended beyond the privileges granted in its

> issuance. Nothing further may be included. There was neither identification of the records, nor probable cause alleged in the affidavits for the seizure of the records, and their taking was illegal, and therefore void."

We are aware that as the result of the complex structure of the various Federal Courts of the United States, numerous conflicts in the decisions of the various Courts are found, but we assert that a research of the various decisions will fail to disclose a more startling conflict in authority upon a question that involves rights of such a fundamental character.

It is impossible to distinguish the *Marron* case and the *Kirvin* case for the purpose of reconciling either the law or the facts.

THIS HONORABLE COURT HAS HAD OCCASION TO DISAPPROVE OF A PORTION OF THE MARRON OPINION BY ITS RECENT DECISION IN THE CASE OF U. S. v. KATZ, 70 ED. 554.

The learned Judge who wrote the opinion in the *Marron* case, as one of the grounds upon which he fortified his conclusion as to the legality of this seizure, relied upon the provisions in Section 10, Title 2, of the National Prohibition Act. (41 St. 312, Sec. 8351i of Barnes Code 1924 Supp.; U. S. Comp. St. par. 10138½e.) See page 255.

That section provides:

> "No person shall manufacture, purchase for sale, sell or transport any liquor without making at the time a permanent record thereof, showing in detail the amount and kind of liquor manufactured, purchased, sold or transported together

with the names and addresses of the persons to whom sold, in case of sale, and the consignor and consignee in case of transportation, and the time and place of such manufacture, sale or transportation. The commissioner may prescribe the form of such record, which shall at all times be open to inspection, as in the act provided."

Section 34 of the same title, Comp. St. Ann. Supp., par. 10138½u, provides that the records required by Section 10, aforesaid "shall be subject to inspection at any reasonable time by the commissioner, or any of his agents, or by any public prosecutor, or by any person designated by him".

The opinion of the first *Marron* case continues as follows on page 255:

> "The gray ledger does not contain all of the information called for by section 10 of title 2 of the Prohibition Act, but it contains a more or less complete record of the liquor purchased, a record of the sales from day to day and in some cases the names of the purchasers. Such a book is not like the private papers of a citizen. It is subject to inspection by a number of persons, and the statute requires it to be kept as a permanent record. It is true that the gray ledger contains other matter in addition to that which the statute required to be kept, but a party who records his affairs in a book subject to inspection cannot complain of the consequent invasion of his privacy."

In the *Katz* case it was definitely held that the provisions of these sections respecting the keeping of records of the sales, etc., of intoxicating liquor was a requirement upon persons permitted to make the sales and not upon persons attempting to make

unlawful sales. After a review of various Federal cases concerning the interpretation to be given this section, Mr. Justice Stone concludes the opinion with this language:

> "We think the reasoning of these cases applicable here and that the words 'no person' in paragraph 10 refer to persons *authorized under other provisions of the act to carry on traffic in alcoholic liquors.*"

The United States Circuit Court of Appeals for the 2nd Circuit as recently as December 6, 1926, has had occasion to again consider its conclusions in the *Kirvin* case, in its decision in *United States v. Kirschenblatt,* reported in 16 Fed. Rep. 2d, page 202.

It is important to observe that the Court in the *Kirschenblatt* case not only considered the effect of its ruling in the *Kirvin* case but likewise took cognizance of the *Marron* case and the *Sayers* case. Thus it may be properly assumed that when the Court unanimously decided to support its conclusion in the *Kirvin* case it by implication refused to be persuaded by the doctrine adhered to by the United States Circuit Court of Appeals for the Ninth Circuit.

THE FACTS IN THE KIRSCHENBLATT CASE.

The matter came before the United States Circuit Court of Appeals in error to the District Court of the United States for the Southern District of New York.

Proceedings had been commenced by Jacob Kirschenblatt against the United States for the recovery

of certain papers seized under warrant by certain agents of the United States. An order was made by the District Court directing the return of the papers and the United States sued out the writ of error.

It appears that a Prohibition Agent obtained a search-warrant to search and seize a trunk alleged to have contained liquor which trunk was in the custody of the American Express Company. The affidavit recited that he had purchased certain whiskey from one Kirschenblatt in New York to ship him under an assumed name certain liquors in the trunk then in the possession of the express company. The trunk was seized and found to contain the liquor ordered. A few days later another Prohibition Agent secured a second warrant in order to search Kirschenblatt's offices. His affidavit recited the issuance of the first warrant, the seizure of the trunk and concluded with a request for a general search of the premises. Armed with the warrant a search was made and Kirschenblatt arrested. The agents seized a small amount of liquor and a number of Kirschenblatt's papers of various kinds. Kirschenblatt was indicted and instituted this proceeding for the recovery of the papers so seized and after a hearing in the District Court an order was made directing the return of all the papers following the decision in *Kirvin v. United States.*

The nature of the documents seized in the case does not appear from an examination of the decision but it does appear that the search-warrant did not particularly describe the seized papers but on the contrary only requested a general search of the premises.

The learned author of the opinion has so carefully digested the various conflicting decisions on the subject and has fortified the Court's position in the *Kirvin* case to such an extent that we deem it advisable to set forth the opinion at length.

> "The officers' entry under the warrant was lawful, the warrant itself being sufficiently supported by the affidavits. The arrest was also lawful, so that the question is of the officers' powers to search either under the warrant or as an incident to the arrest. The prosecution argues that the arrest gave the officers power to search the premises and seize, not only liquors and bottling apparatus, but any incriminatory papers which they found. That the search warrant did not go so far we understand to be agreed; at any rate, so much is plain. It is authorized only by section 25, tit. 2, of the National Prohibition Act (Comp. St. par. 10138½m), which described the property seizable as 'liquor, the containers thereof', and 'property designed for the manufacture of liquor'.
>
> While the last phrase may possibly not exclude all papers, it is plain, at least in a case like this, that the warrant would not justify the indiscriminate seizure of incriminatory documents. For this reason the argument runs that, since a person arrested may be searched, and all documents found upon him may be kept whatever their nature, and since the premises in which he is arrested may be searched for contraband as an incident to the arrest, the search so authorized must be as broad as the search of his person.
>
> It is true that the law has never distinguished between documents and other property found upon the person of one arrested. All may be used in the trial, so far as relevant. Baron v. U. S., 286 F. 822, 824 (C. C. A. 6); U. S. v. Kraus (D. C.) 270 F. 579; Dillon v O'Brien, 16 Cox, Cr. Cas. 245; People v. Chiagles, 237 N. Y. 193, 142 N. E. 583, 32 A. L. R. 676; Getchell v. Page, 103 Me. 387, 69 A. 624, 18 L. R. A. (N. S.) 253, 125

Am. St. Rep. 307; 1 Bishop, New Crim. Proc. par. 211. While the point was not involved, the language in Weeks v. U. S., 232 U. S. 383, 392, 34 S. Ct. 341, 58 L. Ed. 652, L. R. A. 1915B, 834, Ann. Cas. 1915C, 1177, was broad enough to cover it.

Furthermore, the Supreme Court has very recently held that, upon an arrest, the immediate premises may be searched for contraband (Agnello v. U. S., 269 U. S. 20, 46 S. Ct. 4, 70 L. Ed. 145), just as a vehicle may be searched (Carroll v. U. S., 267 U. S. 132, 45 S. Ct. 280, 69 L. Ed. 543, 39 A. L. R. 790), and as officers, once in under a search-warrant, are not confined to the contraband specified in it (Steele v. U. S. (No. 1) 267 U. S. 498, 45 S. Ct. 414, 69 L. Ed. 757; U. S. v. Old Dominion Warehouse Co., 10 F. (2d) 736 (C. C. A. 2). This doctrine has been extended beyond contraband to incriminatory papers in two cases in the Ninth Circuit. Sayers v. U. S., 2 F. (2d) 146; Marron v. U. S., 8 F. (2d) 251.

Brady v. U. S., 300 F. 540 (C. C. A. 6), is put forward as another instance; but, so far as we can learn, the only evidence used against the defendants was contraband liquor.

While we agree that strict consistency might give to a search of the premises, incidental to arrest, the same scope as to a search of the person, it seems to us that that result would admit exactly the evils against which the Fourth Amendment is directed. Whatever the casuistry of border cases, it is broadly a totally different thing to search a man's pockets and use against him what they contain, from ransacking his house for everything which may incriminate him, once you have gained lawful entry, either by means of a search warrant or by his consent. The second is a practice which English-speaking peoples have thought intolerable for over a century and a half. It was against general warrants of search, whose origin was, or was thought to be, derived from Star Chamber, and which had been a pow-

erful weapon for suppressing political agitation, that the decisions were directed, of which Entick v. Carrington, 19 How. St. Trials, 1029, is most often cited. These cases were decided just after the colonists had been hotly aroused by the attempt to enforce customs duties by writs of assistance, and when within 30 years they framed the Fourth Amendment it was general warrants that they especially had in mind. Boyd v. U. S., 116 U. S. 616, 6 S. Ct. 524, 29 L. Ed. 746.

After arresting a man in his house, to rummage at will among his papers in search of whatever will convict him, appears to us to be indistinguishable from what might be done under a general warrant; indeed, the warrant would give more protection, for presumably it must be issued by a magistrate. True, by hypothesis the power would not exist, if the supposed offender were not found on the premises; but it is small consolation to know that one's papers are safe only so long as one is not at home. Such constitutional limitations arise from grievances, real or fancied, which their makers have suffered, and should go pari passu with the supposed evil. They withstand the winds of logic by the depth and toughness of their roots in the past. Nor should we forget that what seems fair enough against a squalid huckster of bad liquor may take on a very different face, if used by a government determined to suppress political opposition under the guise of sedition.

It is likely that the admitted power to seize the fruits, or the tools, of crime, itself rests upon a very ancient basis. People v. Chiagles, 237 N. Y. 193, 196, 142 N. E. 583, 32 A. L. R. 676. At any rate, it is carefully circumscribed in the Search Warrant Act (Comp. St. par. 10496½a et seq.) itself. The pursuit of a thief on hue and cry was a civil as well as criminal remedy, and the captors retook the booty and in early times themselves did execution; the tool or other object which killed a man was deodand and forfeit; a

burglar's kit or a counterfeiter's plate have never been property in the ordinary sense, any more than liquor since the enactment of section 25. Ruder times have ruder remedies, but the power to seize such chattels probably descends from notions which have long since lost their rational foundation, and, while the method has changed, the substance remains.

While the point has never been decided, the language of the Supreme Court accords with our belief that it is only such things that may be seized as an incident to an arrest. Thus, in Carroll v. U. S., 267 U. S. 132, 158, 45 S. Ct. 280, 287 (69 L. Ed. 543, 39 A. L. R. 790), the power was expressed as extending to things 'which it is unlawful for him to have and which may be used to prove the offense'. In Agnello v. U. S., 269 U. S. 20, 30, 46 S. Ct. 4, 5 (70 L. Ed. 145) the phrase is: 'Things connected with the crime as its fruits, or as the means by which it was committed, as well as weapons and other things to effect an escape from custody'. In Gouled v. U. S., 255 U. S. 298, 309, 41 S. Ct. 261, 265 (65 L. Ed. 647) the language is: 'They'—search warrants—'may not be used as a means of gaining access to a man's house or office and papers solely for the purpose of making search to secure evidence to be used against him in a criminal or penal proceeding.' It is true that the last case did not involve an arrest, but the language scarcely admits of limitation on that account.

The real difficulty in the case at bar appears to us to be in the application of the last doctrine, because it is apparent that a paper may be itself the very thing against which the law is directed. U. S. v. Welsh, (D. C.) 247 F. 239, affirmed 267 F. 819 (C. C. A. 2); Search Warrant Act, par. 2, subd. 3 (Comp. St. par. 10496½b). As was said in Gouled v. U. S., papers as such have no sanctity, and may be seized, like any other property, if they offend. Courts have at times extended the doctrine to papers, not actually part

of the criminal act, but necessary to the conduct of the venture as a whole. Dillon v. O'Brien, 16 Cox, Cr. Cas. 245; State v. Mausert, 88 N. J. Law, 286, 95 A. 991, L. R. A. 1916C, 1014; Swan v. U. S., 54 App. D. C. 100, 295 F. 921; Marron v. U. S., 9 Fed. (2d) 251 (C. C. A. 9). Yet, if all records of the offender's doings, such as account books or customers' lists, are to be included, there would seem to be no escape from allowing a search at large through all his papers.

It is seldom that one finds a document containing evidence of crime which was not at one time used in its commission; the papers important in any prosecution are ordinarily either communications passing between the actors or records necessary to keep track of the details. These are all that the prosecution requires, and all that, except in rare instances, it will ever get. They cannot be reached, except by a thorough search of all that the offender has, to allow which would be to countenance exactly what the amendment was designed to prevent. Therefore, while we agree that it is no answer to a search to say that papers have been seized, we cannot agree that the power extends beyond those which are a part of the forbidden act itself. It would be hazardous to attempt any definition; we shall not.

The forged note, the fraudulent prospectus, the policy slip, the written contract, if that be forbidden, the seditious broadside—perhaps all these may be contraband and subject to seizure when found on the premises. But the whole of a man's correspondence, his books of account, the record of his business, in general, the sum of his documentary property—these, in our judgment, are as inviolate upon his arrest as they certainly are upon search warrant. It is enough in the case at bar to say that the record shows no papers seized which fall within the exception.

Order affirmed."

VEEDER v. UNITED STATES, 252 FED. REP. PAGE 414, DECIDED BY THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT SUPPORTS THE CONCLUSIONS ARRIVED AT BY THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT IN KIRVIN v. UNITED STATES.

Veeder v. United States, supra, has definitely decided this important proposition of law in such a manner that it is difficult to ascertain how the confusion has resulted in the conflicting decisions which we have examined thus far in this brief.

Certainly the legal proposition here involved was in that case squarely presented to that Court and its conclusions have successfully withstood assault up to the present day.

In that case it appeared that an examiner of the Federal Trade Commission made an affidavit for the purpose of securing a search-warrant under Title II of the Act of June 15, 1917 (40 Stat. 228, c30). Briefly stated the affidavit recited that the affiant had made a partial examination of the various private papers, records, documents and memoranda in the possession of and owned by Veeder which affiant had good reason to believe had been used in the commission of various felonies in connection with the alteration of the books of certain corporations. A comprehensive enumeration of the various books and memoranda, etc., were referred to. The search-warrant was issued and Veeder sued out a writ of error to the United States Circuit Court of Appeals and challenged the sufficiency of the affidavit and the deposition upon which the search-warrant was issued. The Circuit Court gave expression to the basic funda-

mental principles inherent in our form of government with respect to the forcible invasion of a man's home and the violation of his constitutional rights by agents of the United States Government in their quest for evidence of crime. It discussed in its decision the failure of the affiant to set forth positively the facts alleged in the affidavit and noted further its deficiency in many other respects.

More important, however, was its decision with respect to the nature and character of the various papers, documents and memoranda referred to in the affidavit as the means and instruments in the commission of the felonies set forth therein. At page 418 the Court said:

> *"No search warrant should be broader than the justifying basis of facts. For example, if a murder has been committed by means of a shot from a gun and by no other means, the search-warrant should not direct the officer to enter the accused's home and seize the family register of births and deaths. And as the serving officer has no discretion in executing the search warrant in its entirety, the householder is entitled to have the search-warrant quashed.*
>
> *It is not every kind of property that may be seized under a search-warrant. Limited by McIsaac's accusation, the statute applies only to property that 'was used as the means of committing a felony'. By exclusion, therefore, papers and documents which afford evidence that a felony has been committed, but which were not the means of committing it, are immune from seizure."*

We repeat at the expense of being prolix that neither the "gray ledger" in the instant case nor the other private documents and memoranda seized by

the agents at the time were the means of committing the crime as alleged in the indictment although they may have afforded evidence that such a crime had been committed. And in making such a statement it is to be remembered that not a single document, paper or memorandum was so much as remotely referred to in the application for the search-warrant or in the warrant itself.

CONCLUSION.

From the inception of this case counsel for Marron have conscientiously and honestly believed that his constitutional rights have been violated and every step taken by him throughout the entire controversy has been taken in the highest of good faith, fortified by an abiding conviction that the Highest Court in this country will recognize and preserve these rights and that by its decision in this case remove for all time the possibility of further injury to its citizens as must result if the decisions of the United States Circuit Court of Appeals for the Ninth Circuit be permitted to stand.

Dated, San Francisco,
August 27, 1927.

Respectfully submitted,
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